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July 1, 2004

**VIA HAND DELIVERY**

Honorable Jean Stone, Esq., Hearing Officer  
c/o Sharla Dillon, Docket & Records Manager  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, Tennessee 37243-0505

***RE: Petition of Cellco Partnership d/b/a Verizon Wireless  
For Arbitration Under the Telecommunications Act of 1996  
TRA Consolidated Docket # 03-00585***

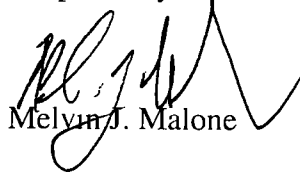
Dear Hearing Officer Stone:

Enclosed please find one (1) original and thirteen (13) copies of the CMRS Providers' Response to TEC Companies' Request for Reconsideration of Order Granting Motion to Compel

Also enclosed is an additional copy of the CMRS Providers' Response to be "Filed Stamped" for our records.

If you have any questions or need additional information, please let me know.

Respectfully,

  
Melvin J. Malone

MJM:cgb  
Enclosure

cc Parties of Record

**BEFORE THE  
TENNESSEE REGULATORY AUTHORITY**

Petition of:

Cellco Partnership d/b/a Verizon  
Wireless For Arbitration Under the  
Telecommunications Act of 1996

Consolidated Docket  
No. 03-00585

**CMRS PROVIDERS' RESPONSE TO TEC COMPANIES'  
REQUEST FOR RECONSIDERATION OF  
ORDER GRANTING MOTION TO COMPEL**

Petitioners Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"), AT&T Wireless PCS, LLC d/b/a AT&T Wireless ("AT&T Wireless"), BellSouth Mobility LLC, BellSouth Personal Communications LLC and Chattanooga MSA Limited Partnership, collectively d/b/a Cingular Wireless ("Cingular Wireless"); Sprint Spectrum L.P. d/b/a Sprint PCS ("Sprint PCS"), and T-Mobile USA, Inc. ("T-Mobile"), collectively referred to herein as the CMRS Providers, hereby reply to the TEC Companies' Request for Reconsideration of the Order Granting the Motion to Compel in this matter

**BACKGROUND**

Consistent with the Procedural Schedule in this matter, the CMRS Providers submitted their First Set of Interrogatories to each member of the Rural Coalition of Small LECs and Cooperatives (the "Coalition") on March 19, 2004. Included was the Interrogatory in dispute, No. 37, which requested audited financial statements from 2001, 2002, 2003, and 2004. The Coalition served responses on March 29, 2004. In particular, the Coalition response to Interrogatory No. 37 was as follows: "The Coalition objects to this request as not seeking documents relevant to the issues before the Tennessee Regulatory Authority in the arbitration."

On April 27, 2004, the CMRS Providers' submitted a letter to the Coalition, indicating that a number of the Coalition's discovery responses were inadequate or otherwise not responsive and informally requesting supplements to the Coalition's responses, including supplements to Interrogatory No. 37. Various communications and discussions regarding the CMRS Providers' request for supplements occurred between the parties.<sup>1</sup> During the discussions and in the spirit of compromise, the CMRS Providers revised Interrogatory 37 to request fewer financial statements as follows. "Please provide copies of each Coalition member's most recent two audited financial statements containing Part 32 - Uniform System of Accounts level detail."

On June 11, 2004, the parties filed a Joint Statement with the Hearing Officer which set forth, among other things, the various discovery issues which still needed to be addressed by the pending Motion to Compel. Interrogatory No. 37 was identified as one of those issues, because the Coalition response to the modified request was simply to state that the "Rural Coalition will provide a response after conferring with our clients." On June 17, 2004, the Hearing Officer issued her ruling on the Motion to Compel and required the Coalition to produce, among other things, financial statements per the revised Interrogatory No. 37 by June 23, 2004.

After entry of the June 17 Order Granting the Motion to Compel, the Coalition indicated a willingness to produce the financial statements subject to a higher level of confidentiality than is provided in the Protective Order which was crafted by the parties and approved by the TRA by an order dated April 12, 2004 (the "Protective Order"), and reservation of the Coalition's right to

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<sup>1</sup> The detailed background of the discovery dispute is set forth in the CMRS Providers' Motion to Compel Responses to Interrogatories and the CMRS/Rural Coalition Joint Statement RE Interrogatories Subject to the CMRS Providers' May 13, 2004 Motion to Compel. Other relevant background information is contained within the correspondence sent to the Hearing Officer and all parties on June 24, 2004.

object to the admissibility or relevance of the information produced.<sup>2</sup> In fact, many of the Coalition members have sent what purport to be audited financial statements (and also access cost studies, as requested in Interrogatory 38) to counsel for Cingular Wireless (as the contact for all CMRS Providers) *on the condition that* such statements and studies be accorded a higher level of confidentiality than is provided for in the Protective Order. Counsel for Cingular Wireless has not opened any of the purported financial statements or cost studies, nor forwarded them to anyone else, but has instead requested that the Pre-Arbitration Officer convene a conference call to discuss the Coalition's demand for dual track protective orders.<sup>3</sup>

It appears that the TEC Companies (i.e., three of the 21 members of the Coalition) have now chosen a different path, refusing to produce any audited financial statements on the grounds that such statements are not relevant, and seeking through their Request for Reconsideration to contest not only the relevancy of the requested financial statements but also certain underlying issues in the arbitration previously ruled upon by the Pre-Arbitration Officer in response to the Coalition's Motion to Dismiss. This is improper. The Coalition's Request for Reconsideration should be rejected, because the requested audited financial statements are in fact relevant to the pricing disputes in the arbitration, and because the other issues raised in the Request for Reconsideration cannot properly be considered in the context of a discovery motion.

### **STANDARDS APPLICABLE TO DISCOVERY DISPUTES**

Under TRA Rules, Chapter 1220-1-2-.11, discovery in a contested case "shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure." Under Tenn. Civ. Proc. Rule 26.02(1), "Parties may obtain discovery regarding any matter, not privileged, which is

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<sup>2</sup> See June 23, 2004 Letter from William Ramsey, transmitting the Coalition's supplemental discovery responses

relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party . . .” The phrase “relevant to the subject matter involved in the pending action” has been construed to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.<sup>4</sup>

As regarding relevance, the TRA has further opined:

In order for evidence to be relevant, the evidence must satisfy two criteria. First, the evidence must have the tendency to make the existence of any fact more probable or less probable than it would be without the evidence. Second, the fact sought to be proven must be material. A material fact is of consequence to the determination of the action . . . Evidence offered in a cause or a question propounded, is material when it is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case.<sup>5</sup>

### **TEC Companies' Challenge to Interrogatory 37**

In the Request for Reconsideration, the TEC Companies present two arguments as to why the requested audited financial statements should not be produced:

1. The TEC Companies are not subject to the pricing standard set forth in § 252(d) of the Telecommunications Act.<sup>6</sup>

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<sup>3</sup> See June 24, 2004 e-mail from Paul Walters to Bill Ramsey and Kim Beals.

<sup>4</sup> *Price v Mercury Supply Co* , 682 S W.2d 924 (Tenn. Ct App 1984)

<sup>5</sup> Pre-Hearing Order Reflecting Action Taken at Pre-Hearing and Status Conferences Held on March 24, 2000, March 29, 2000, and April 5, 2000 and Decisions on Motions in Limine and Objections to Pre-Filed Testimony and Exhibits, In Re Application of Memphis Networx, LLC for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunication Services and Joint Petition of Memphis Light Gas & Water, a Division of the City of Memphis, Tennessee and A&L Networks-Tennessee, LLC for Approval of Agreement between MLGW and A&L Regarding Joint Ownership of Memphis Networx, LLC, TRA Docket No. 99-00909, p 15 (April 28, 2000)

<sup>6</sup> Request For Reconsideration, p 3

2. Even if those pricing standards were applicable, the requested audited financial statements would not be relevant.<sup>7</sup>

### **1. Obligation to Comply with Applicable Pricing Standards**

The majority of the Request for Reconsideration consists of various arguments why the TEC Companies are not subject to the Act's pricing standards, at least one of which has previously been rejected by the Pre-Arbitration Officer in her ruling on the Coalition's Motion to Dismiss.<sup>8</sup> However, whether the TEC companies are subject to the FCC's pricing standards is irrelevant to the instant discovery dispute. The applicability of the FCC's pricing standards to the Coalition members is an issue that has been properly raised in the arbitration proceeding. *See* Issue No. 8 of the Joint Issues Matrix filed herein.

Contrary to the approach seemingly advocated by the TEC Companies, there is no obligation that a party first prevail on the merits of the underlying issues in dispute before being entitled to obtain discovery on that issue. If that were the case, the right to discovery would be meaningless. As is explained in detail below, the financial statements are clearly relevant to the issues raised in the arbitration and thus should be produced.

### **2. Relevancy of Requested Financial Statements**

The information contained in the requested financial statements is clearly relevant to the issue of the costs of transport and termination. For example:

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<sup>7</sup> *Id.*, p. 4

<sup>8</sup> In large part, this motion rehashes arguments previously raised in the Coalition's Motion to Dismiss and resolved some time ago by the Pre-Arbitration Officer, including the argument that the pricing standards are not relevant to indirect interconnection (*See* the discussion at p. 6 of the Order Denying Motion, April 12, 2004). It should be noted that the Coalition, including the TEC Companies, failed to seek a reconsideration of the order denying the motion to dismiss before the Hearing Officer or an appeal before the Directors.

1. While a TELRIC study is forward-looking, rather than solely based on the books of account, the financial statements are useful to develop maintenance expense factors for use in a transport and termination TELRIC study. Plant maintenance expense factors typically are based on the ratio of plant expenses to average investment. The expenses and investments are taken from the financial accounts and adjusted as needed.

2. The financial statements are useful in analyzing the levels of common costs and in developing a reasonable forward-looking common cost factor to load common costs on the TELRIC to produce forward-looking economic costs.

3. Financial statements are useful in identifying significant recent additions to switching, cable and wire and circuit equipment plant, the main components of transport and termination. If an ILEC has made significant additions, then the construction costs would represent fairly recent measures of the ILEC's true current cost of those plant types. A request could then be made to see details on the construction jobs in order to better evaluate the company's actual costs and the underlying drivers, such as cable costs / foot, transmission system costs, capacities and unit costs, etc.

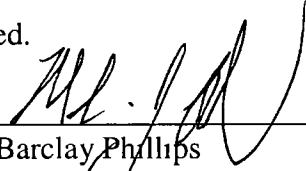
4. Financial statements are useful in determining an ILEC's current debt ratio. This ratio along with forward-looking estimates of the cost of debt and cost of equity are used in developing a composite cost of money. Similarly, the financial statements can be used to compute an effective income tax rate.

5. Finally, the financial statements provide a good overall sense of the ILEC's cost structure for comparison with the costing reflected in the forward-looking transport and termination cost study.

In sum, the requested financial statements are clearly relevant under the Act and FCC Rules, and the TEC Companies should produce them.

### CONCLUSION

In support of their motion, the TEC Companies seem intent on arguing the merits of the disputed issues underlying this arbitration. The only issue in this discovery dispute, however, is whether the information sought is relevant to the issues in this proceeding. As noted above, Interrogatory No. 37 is clearly relevant, and the CMRS Providers are entitled to the audited financial statements requested. Thus, the Order on the Motion to Compel was well-grounded and should not be reversed or otherwise modified.



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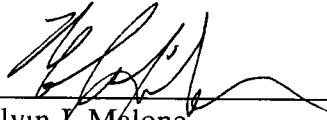
DATED: Feb 1, 2004

## CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2004, a true and correct copy of the foregoing has been served on the parties of record, via the method indicated:

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